IN THE

Supreme Court of the United States

No. 13, October Term, 1968

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,
Appellants

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL.,
Appellees

On Appeal From the United States District Court for the Eastern District of Louisiana, New Orleans Division

PETITION FOR REHEARING RELATING SOLELY TO THE TERMS OF THE JUDGMENT AND ORDER TO BE ENTERED BY THIS COURT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

PETITION FOR REHEARING RELATING SOLELY TO THE TERMS OF THE JUDGMENT AND ORDER TO BE ENTERED BY THIS COURT.

These Appellants respectfully petition the Court for rehearing for the purpose of providing by its judgment and order that the District Court—in order to prevent inequity, unnecessary expense, and a multiplicity of actions—shall hold the case in *statu quo* pending the Interstate Commerce Commission report on remand. The following reasons are shown in support thereof:

After many years of litigation upon petition of Northern lines for an increase in their share of freight revenues on traffic handled jointly with Southern lines, the Interstate Commerce Commission granted Northern lines increases, solely on the basis of their higher costs. The District Court found that seven cost items accounted for those higher costs (A. 343), and it ruled that the Commission's decision was legally deficient with respect to all seven (A. 348, 349). This Court, however, concluded that the Commission's findings were adequate with respect to four of the items and deficient with respect to only three thereof (Opinion of Nov. 12, 1968, pp. 6-8), as to which the Commission on remand was to make "specific findings" (p. 6). The opinion concluded that the judgment of the District Court be modified and, as modified, affirmed (p. 6).

The divisions prescribed by the Commission's order went into effect on April 20, 1965 upon the District Court's denial of an interlocutory injunction. That order of denial provided that the railroads would be obliged to resettle their interline accounts on the basis of the pre-existing divisions as to all traffic moving after April 20, 1965 if the Commission's order should be "permanently set aside" (A. 169-171, 359). The District Court's judgment, after hearing on the merits, provided that the Commission's order be set aside and the cause remanded to the Commission, and judgment has been stayed pending disposition of the present appeals (A. 358-359).

It is respectfully submitted that until the Commission makes the specific findings on the three cost issues as directed by the opinion of this Court, it cannot be known whether a permanent setting aside of the order would be appropriate.

If the Commission's order were to be permanently set aside at this time and, after consideration on remand, the Commission should make valid findings sustaining the previ-

ously prescribed divisions (or some other basis higher for Northern than for Southern lines), the following expensive and wasteful transactions would result:

1. Northern lines would be obliged to pay over to Southern lines in excess of $25 million plus interest at 5% on past shipments;

2. On current shipments the railroads would be obliged to rearrange their interline accounting procedures on North-South traffic (about a million cars annually) and apply the pre-existing divisions in lieu of those prescribed by the Commission's order;

3. The refund of the $25 million and the changeover from the prescribed to the pre-existing divisions on current business would entail a large amount of accounting work and expense, with Northern lines bearing the Southern lines' changeover expenses as provided in the District Court's order of June 3, 1965;

4. Thereafter, following the Commission's making of valid findings reaffirming its prior conclusions (or approving some other divisions higher for Northern than for Southern lines) the $25 million (or the other appropriate amount) would, in equity and justice, have to be reshifted, this time from the Southern lines to the the Northern lines, and the accounts of current business would have to be resettled and the money attributable thereto retransferred. This would entail still more accounting expense, and this, together with the accounting expenses previously paid over to Southern lines, would now have to be refunded to Northern lines.

5. In the absence of the relief here sought, a multiplicity of actions would be required to recover the moneys due under the facts of paragraph 4 above. See *B.&O. R. Co. v. United States*, 279 U. S. 781 (1929).

Under Section 15(6) of the Interstate Commerce Act, the Commission is without authority to prescribe divisions retroactively except in circumstances not here present. *Brimstone R. R. Co. v. United States,* 276 U. S. 104, 117-123 (1928); *United States v. Baltimore & Ohio R. Co.,* 284 U. S. 195 (1931).

In view of the foregoing, it is respectfully submitted that, in addition to providing (as now contemplated by this Court's opinion) for remand to the Commission with instructions to make specific findings on the three cost items found deficient, this Court's judgment should instruct the District Court to hold the case, staying its final decree, until the Commission issues its report on remand.

The decisions of this Court clearly support the propriety of such an order.

In *Morgan v. United States,* 298 U. S. 468 (1936), 304 U. S. 1 (1938), 307 U. S. 183 (1939), a number of agencies performing stockyard services sued to set aside an order of the Secretary of Agriculture prescribing reduced charges for their services, and the District Court had issued a temporary restraining order enjoining enforcement of the reduced charges but upon the condition that the difference between those and the old charges be paid into Court pending final disposition of the case. This Court held that the Secretary had not accorded to Appellees the full hearing required by the Act, and the case was remanded for further proceedings before the Secretary. Thereafter, before the Secretary acted on remand, an appeal was taken from an order by the District Court requiring distribution of the fund to the market agencies. In 307 U. S. 183, at 190, this Court stated the questions involved, including the question ". . . whether, in the exercise of its discretion, the court should retain the fund until such time as the Secretary, pro-

ceeding with due expedition, shall make his final determination and order." Then the Court went on to state:

> "In answering these questions there are two cardinal principles which must guide us to our conclusion. The one is that in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. . . . The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see *Ford Motor Co. v. National Labor Relations Board,* 305 U. S. 364, 373; *Inland Steel Co. v. United States,* 306 U. S. 153; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles."

The Court concluded (at page 198):

> "A proceeding is now pending before the Secretary in which, as we have seen, he is free to determine the reasonableness of the rates. His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district

court in making distribution of the fund in its custody. *Atlantic Coast Line R. Co. v. Florida, supra,* 312-313, 317. Due regard for the discharge of the court's own responsibility to the litigants and to the public and the appropriate exercise of its discretion in such manner as to effectuate the policy of the Act and facilitate administration of the system which it has set up, require retention of the fund by the district court until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him."

Addison v. Holly Hill Company, 322 U. S. 607 (1944) was an action by employes of a canning company to recover minimum wages under the Fair Labor Standards Act. The Act had no application to persons employed in processing agricultural products in the area of production. After plaintiffs recovered below, this Court ruled that the Administrator had exceeded his authority in defining the area of production with relation, in part, to the number of persons employed by a given company. The Court held, therefore, that the case should be remanded to the Administrator for a redefinition of the area of production. Although the money involved had not been paid into Court, the District Court was instructed by this Court to "hold the case" until the Administrator "by making a valid determination * * * with all deliberate speed acts within the authority given him by Congress" (p. 619).

In *Atlantic Coast Line R. Co. v. Florida,* 295 U. S. 301 (1935), intrastate charges had been collected by a railroad in accordance with an order of the Interstate Commerce Commission later held invalid because not supported by adequate findings. Thereafter the Commission, upon new evidence and new findings, made the same order it had made

before. Shippers who had paid the higher rates sued to recover the excess over the old charges on shipments that moved during the period when the first order was in effect. Notwithstanding the defect in the Commission's first order, in view of its having supplied the necessary findings upon the reopening of the case, recovery was denied.

A result similar to that achieved in the cases just discussed was brought about in *Secretary of Agriculture v. United States*, 347 U. S. 645 (1954), wherein this Court concluded that the Commission's findings were inadequate to show the basis for its approval of charges for unloading freight. It vacated the judgment of the lower court which had upheld the Commission and it remanded the case to the Commission for further findings, but without setting the Commission's order aside. The increased rates which had been approved by the Commission therefore continued to be charged while the Commission gave consideration to the matter on remand.

The propriety of the relief sought by this petition is thus well established in the precedents of this Court.

CONCLUSION.

In view of the foregoing, Appellants, the Northern railroads, respectfully pray that the Court enter an order remanding this case to the District Court with instructions

(a) to enter an order providing that its judgment is modified to conform to the opinion of the Supreme Court;

(b) to remand the case to the Interstate Commerce Commission for specific findings on the three items of adjustment of average territorial costs as to which this Court held the Commission's findings to be deficient; and

(c) to stay its final decree pending consideration by the Commission upon remand, and thereafter to make such further order or orders as may in equity and justice be required with respect to the resettlement of accounts as between Northern and Southern lines on the basis of valid findings made by the Commission in the remand proceedings.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify, pursuant to Rule 58(1) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay.

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